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In The

Supreme Court of the United States

October Term, 1974

No. 74-1844

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, ROBERT Q. CRANE, ANGELO AMATO and JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

On Appeal from the United States District Court for the District of Massachusetts

BRIEF FOR APPELLEE

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In The

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Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

On Appeal From The United States District Court For The District of Massachusetts.

BRIEF FOR APPELLEE

STATUTORY PROVISIONS INVOLVED

The validity of Mass. Gen. Laws ch. 32, §26(3)(a) is involved, which provides, in pertinent part:

> "Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

The text of the pertinent portion of the statute is found at page 210 of Volume 3A of the Massachusetts General Laws (West Publishing Company 1966).

Chapter 32 of the Massachusetts General Laws, of which §26(3)(a) is a part, is entitled Contributory Retirement System for Public Employees. Under that chapter, the Massachusetts Board of Retirement is established and empowered to mandatorily retire employees under Mass. Gen. Laws ch. 32, §5(1)(a) which provides in pertinent part:

> "Any member in service shall be retired for superannuation upon attaining the maximum age for his group . . . ."

The text of the pertinent portion of the statute is found at page 29 of the supplement to Volume 3A of the Massachusetts General Laws (West Publishing Company 1975).

Mass. Gen. Laws ch. 22, §9A to which Mass. Gen. Laws ch. 32, §26(3)(a) refers is the statute under which the state police is created and provides in pertinent part:

> "Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police . . . .
>
> The appointment of the additional officers herein provided for shall be by enlistment for terms not exceeding three years . . . . The commissioner may . . . make rules and regulations for said additional force, including matters pertaining to their discipline, organization and government, compensation and equipment, and means of swift transportation . . . .
>
> No officer appointed under this section shall be denied re-enlistment if he has served satisfactorily for six years or more; provided, that he has passed such physical examination as is prescribed by rules and regulations made hereunder . . . ."

The text of the pertinent portion of the statute is found at page 119 of the supplement to Volume 2A of the Massachusetts General Laws (West Publishing Company 1975).

QUESTION PRESENTED

Did the district court err in determining that the classification established in Mass. Gen. Laws ch. 32, §26(3)(a), which requires mandatory retirement for superannuation at age 50 of members of the Uniformed Branch of the Massachusetts State Police, lacks a rational basis in furthering any state interest and therefore violates the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Prior Proceedings

On May 8, 1972 the Massachusetts Board of Retirement notified the appellee, Robert D. Murgia, as follows:

> "According to the birth record on file with this Board, you will attain age 50 on 7-23-72, which is the maximum age for Group 3 in which you are classified.
>
> In accordance with section 5 (1) (a) of chapter 32 of the General Laws, you must retire for superannuation as of the date on which your 50th birthday occurs" (R. Letter of Board of Retirement to Robert D. Murgia).

Thereafter on July 7, 1972, Murgia commenced a civil action in the United States District Court for the District of Massachusetts, alleging that the operation of the mandatory retirement statute, Mass. Gen. Laws ch. 32, §26(3)(a), denied him equal protection of the laws and requesting the convening of a three-judge court to adjudicate his claim in accordance with 28 U.S.C. §§2281, 2284 (1970) and for interlocutory relief.

After a hearing on the request for the convening of a three-judge court, the district judge dismissed the complaint for failure to raise a substantial constitutional question. The plaintiff appealed the decision to the United States Court of Appeals for the First Circuit, which on September 10, 1973 ordered that the judgment of the district court be set aside and the case be remanded for the impanelling of a three-judge court.

The three-judge panel was designated on October 16, 1973. On October 26, defendants filed a motion to dismiss the complaint. The parties requested that a hearing be scheduled after January 11, 1974 and indicated that, there appearing to be no real dispute as to the factual basis of the claim, an agreed statement of facts could be submitted prior to the hearing.

Thereafter on January 18, 1974 the court set the matter down for hearing and ordered the parties to submit the agreed statement of facts prior to the hearing. Plaintiff filed an amended complaint. Defendants' motion to dismiss was heard on March 13, 1974 and was denied. The parties were ultimately unable to agree on a statement of facts. The plaintiff therefore filed a request for admissions of fact and the defendant filed its response of defendants to request for admissions. The parties

waived the presentation of evidence at a hearing and submitted a joint record consisting of depositions, affidavits, the plaintiff's request for admissions of fact, defendants' response and other documentary material. Each party filed briefs and the court took the matter under advisement.

On May 31, 1974 the district court in an opinion written by Senior Circuit Judge Bailey Aldrich declared Mass. Gen. Laws ch. 32, §26(3)(a) unconstitutional and void because it violated plaintiff's right to equal protection of the laws under the Fourteenth Amendment to the Constitution.

In so ruling, the court found that the plaintiff had succeeded in showing that the challenged statute lacked a rational basis because there was not a fair and substantial relation of the statutory classification to the object of the legislation. The court did not reach the plaintiff's alternate contentions that the right to employment should be considered a fundamental interest and that age should be considered a suspect classification.

In its opinion, the court acknowledged the fact that service in the Uniformed Branch of the Massachusetts State Police was arduous and required high versatility. *Murgia v. Massachusetts Board of Retirement,* 376 F. Supp. 753, 754 (hereinafter cited as 376 F. Supp.____). The court expressly stated that the statutory object of maintaining a vigorous and capable force was fully justified. It further noted that none of this was challenged by the plaintiff. 376 F. Supp. at 754.

The court also specifically affirmed the propriety of legislative classification based upon arbitrary line-drawing in

many, if not most, circumstances (376 F. Supp. at 754). It held, however, that this undeniably proper legislative function does not permit the legislative use of such arbitrary classification in total disregard of accurate and detailed information which the state itself had gathered where such information shows that the legislative classification was unrelated to the valid purposes of the statute. 376 F. Supp. at 756.

The court found that the legitimate legislative object of maintaining vigorous, healthy personnel was not served by a classification which required mandatory retirement at age 50, because this classification totally disregarded the individualized determinations of fitness made by the state through the elaborate medical screening system uniformly applied to each member from the time he enlisted until he retired. *Id.*

The evidence showed that, pursuant to the granting of authority contained in Mass. Gen. Laws ch. 22, §9A, the Commissioner of Public Safety had established comprehensive fitness standards entitled Medical Fitness Standards for Initial Appointment to the Massachusetts State Police (A193-256). The members were required to maintain these standards throughout their career in order to continue to serve as state police officers (A129-133). The member's fitness was measured by individual medical examination against the established standards at the time of initial enlistment and every two years thereafter upon the member's biannual application for reenlistment (A146, 148). Beginning at age 40 and continuing on an annual basis until retirement, the officer was examined using the identical standards as applied to the initial recruit (A148). In addition, the over-40 officer was annually given an electrocardiogram andwas

tested for gastro-intestinal bleeding (A148). If a member was found to have a physical defect which would impair his duties and functions as a state police officer, he was declared unfit and retired from service unless he obtained a waiver from the Commissioner of Public Safety to continue (A156-158). After the member's sixth year in service, passage of the physical examination became the sole criterion for continued service. Mass. Gen. Laws ch. 22, §9A. Passage of the physical examination was the official determination that the officer was fully qualified to continue in service (Request for Admission, No. 55; Response of Defendants, No. 55; A42-43, 52) (hereinafter "F55").

Because of these undisputed facts and the fact that the plaintiff had passed his physical examination three months prior to being retired and had been declared fully fit to continue, Mass. Gen. Laws ch. 32, §26(3)(a) was held to establish an irrational classification because it required mandatory retirement for superannuation for a group which had already been individually tested and been classified as fit.

After a further hearing on the nature of relief to be granted held on October 22, 1974, the court entered an order enjoining the defendants, the Board of Retirement and the Commissioner of Public Safety, from enforcing Mass. Gen. Laws ch. 32, §26(3)(a) against the plaintiff.

Facts

The defendant, the Commonwealth of Massachusetts Board of Retirement (hereinafter "Retirement Board"), is an

administrative agency of the Commonwealth of Massachusetts charged with the administration of the retirement system for state employees established under Mass. Gen. Laws ch. 32. The individual defendants Crane, Amato and Maloney are the three members of the Board who administer the system. The individual defendant Callanan is the Executive Secretary of the Board, and the individual defendant Kehoe is the Commissioner of Public Safety of the Commonwealth.

The Massachusetts State Police is established under Mass. Gen. Laws ch. 22 and represents the statewide police force for the Commonwealth of Massachusetts (F7). The Uniformed Branch consists of approximately 880 members (F11) and is organized in a paramilitary fashion (R. Rules and Regulations of the Uniformed Branch of the Massachusetts State Police) for the primary purpose of providing protection for persons and property and for the maintenance of law and order. Mass. Gen. Laws ch. 22, §9A (F33). Its specific duties are defined in Rules and Regulations of the Uniformed Branch of the Massachusetts State Police, *supra,* and include road patrolling on state highways, responding to general emergencies, natural disasters and civil disorders, the prevention and detection of crime, the apprehension of criminals and providing support as a back-up force for local law enforcement officials (A54-55, 57-58, F33, 36).

To qualify for initial appointment as a member of the Uniformed Branch, each applicant must meet the medical and psychological fitness standards established in the Medical Fitness Standards for Initial Appointment to the Massachusetts State Police (A193-256). The standards are adopted almost word

for word from those used by the United States Army (A129-130). The examination includes the taking of a thorough medical history, a urine examination, a blood serology, chest x-ray, audiometric examination, and tests to determine color vision, near vision or distant vision, blood pressure, pulse, height and weight, color hair, color eyes and body build. The physician then examines the following areas for defects: head, face, neck and scalp, nose, sinuses, mouth and throat, ears, eardrums, eyes, opthalmoscopic, pupils, ocular motility, lungs and chest, heart, vascular system, abdomen, viscera, anus and rectum, endocrine system, G-U system, upper extremities, feet, lower extremities, spine, identifying body marks, skin-lymphatics, neurologic and psychiatric systems; in some instances an EKG is performed (A133-137).

The examination is made under the direction of the State Police Surgeon (A119-120, 132-133), who uses as his assistants in this duty, medical specialists of every type including "surgeons, internists, neurologists, opthalmologists, radiologists, [and] urologists" (A187-188). The medical records become part of the officer's permanent file (A137-138). Failure to meet the medical fitness standards results in denial of enlistment (A128-129). The applicant must also pass an agility test, a written examination and an oral interview (F12). The initial enlistment term is for a period of two years (F14). After the initial term the member may choose to reenlist for an additional two-year term (F13, 14). In that event, the member must again be examined and found to be fit to perform his duties. His medical records are reviewed, he is interviewed by the Police Surgeon (A150), and he is subjected to reenlistment medical and psychological examinations which are identical to those administered under Medical Fitness Standards

for Initial Appointment to the Massachusetts State Police (A148). If the member is found to be unfit to perform his duties, he may not continue to serve in the state police without a specific waiver from the Commissioner of Public Safety (F24, 25, 26, 27, 29). Thereafter, with the passage of each succeeding two-year period, the member may reenlist for an additional two-year term. Should he decide to do so, in each instance he must again be subject to the reenlistment physical and be found fit to perform his duties (A146).

Beginning at age 40 the physical fitness criteria for continued service are made more rigorous. The member is subjected to the same examination but on an annual basis with the addition of an electrocardiogram and tests for gastro-intestinal bleeding (A148). An officer who is found not to be able to perform his duties is retired unless he obtains a specific waiver from the Commissioner of Public Safety (A156-157; F29).

Plaintiff Robert D. Murgia was born on July 23, 1922 and joined the Uniformed Branch of the Massachusetts State Police on April 7, 1948 (F74, 75). The plaintiff served satisfactorily in every rank and office he held (F77), and on March 1, 1967 he was appointed Lieutenant Colonel, the highest rank in the Uniformed Branch of the Massachusetts State Police (F76). In March 1972, the plaintiff was given his mandatory physical examination by the State Police Surgeon and declared to be fully qualified to continue his duties (F78). On his 50th birthday in July 1972, he was mandatorily retired for superannuation (F80).

In the proceedings below the Commonwealth acknowledged that all state police officers who pass the physical examinations are fit to perform all of the duties assigned to members of the Uniformed Branch of the Massachusetts State Police. Specifically, the Commonwealth admitted:

> ". . .When a member passes his re-enlistment or annual physical, he is found to be qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police" (F55).
>
> "A member's physical condition as it relates to his ability to perform the duties of the Uniformed Branch is determined at annual and/or re-enlistment physical examinations; members who pass the physical examinations are determined able to perform the duties of the Uniformed Branch" (F60).

The Commonwealth admitted that 50-year-old officers are capable of performing the duties of Massachusetts State Police officers, depending upon their individual physical condition (F59). The Commonwealth admitted that despite the determination of fitness, members at age 50 are forced to retire solely because of their age.

> "Members who pass the physical examinations and are fully qualified to continue in service must retire if they are fifty years of age and have twenty years of service" (F63).

In addition to the admissions, the depositions of three doctors were put into evidence. Dr. Thomas R. Dawber, the head of the cardiovascular epidemiology section of the Evans Department of Medical Research of the Boston University School of Medicine and director of the Framingham Heart study, testified that the aging process differed vastly from one individual to another (A81) and that medical testing provides reasonably accurate predictions of initial fitness (A77-79).

Dr. Thomas F. Silva, Jr., a surgeon and the physician for the Boston Celtics Professional Basketball Team, testified that men of 50 were capable of performing the physical duties which might be required of a state police officer (R. Deposition of Dr. Thomas F. Silva, Jr. at 7-9).

Colonel Paul Murphy, the State Police Surgeon, testified that he was responsible for the promulgation of the medical fitness standards for the Massachusetts State Police (A129-130) and that he was responsible for the testing of each member of the Uniformed Branch (A132-133). He testified that the duties of the state police required vigorous personnel (A142-147); that the evidence of cardiovascular disease in the state police in the age 40-50 range was the same as in the general population (A175-176); that certain men over 50 were capable of performing the duties of state policemen (A173); that duty in the state police is like battalion commander duty in the National Guard which is a combat position (A181-182).[1] He testified that he had examined

1. Appellants in their brief have stated that "[t]he recommended retirement age for battalion commander is 45" (Brief for Appellants at 10). Colonel Murphy stated that battalion commander retirement is established by National Guard Regulation 600-100 which he read into the record as follows:

(Cont'd)

the plaintiff and found him fully capable of performing the duties of a state police officer (A191).

Each of the doctors had examined the plaintiff and found him in good physical condition (A69, 112, 191).

SUMMARY OF ARGUMENT

The decision of the three-judge panel of the United States District Court for the District of Massachusetts in this case does not represent a sweeping attack upon age-based legislative classifications, mandatory retirement statutes or an improper application of the holding of this Court in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Rather, it is a decision bearing upon a particular and unique factual situation which correctly applies the conventional rational basis test under the Equal Protection Clause of the Fourteenth Amendment to the irrational operation of a statutory classification. The decision should be affirmed by this Court.

(Cont'd)

> "Officers In TOE — that is, Table of Organization & Equipment — are expected to be of suitable age for their positions on mobilization. It is realized that age alone is not always a valid criterion in determining suitability for a position. Consequently, much depends on the type of unit and the individual's ability, knowledge, skill, experience, vigor and general value to the service. As a general rule, however, officers should not be assigned to TOE units if their age exceeds that shown below. Officers now holding TOE positions will not be removed solely because their ages exceed that shown" (A181-183).

These regulations pertain to recommended maximum ages for *initial appointment*. They are guidelines only, not fixed requirements. The regulations specifically provide that officers whose ages exceed the recommended age will not be removed for that reason.

Appellee's first argument reviews the analysis used by the district court in deciding the issues before it. The court chose to employ the rational basis test under the Equal Protection Clause and rejected a strict scrutiny test. It did not reach potential issues under the Due Process Clause. The court applied the rational basis test in a two-step procedure; first, determining the legitimate state interests and then determining whether the classification bore any rational relation to those interests. The lower court properly adopted the Commonwealth's own statement as to the purpose of the legislation — to maintain a fit and vigorous state police force. This is an undisputedly proper state interest.

The court next turned to the operation of the classification which mandatorily retired state police officers at age 50 for superannuation. Pursuant to the statutory scheme, the state police officers were regularly screened for fitness by individualized medical testing. Those who failed the rigorous examination procedures were separated from service with the result that those who remained were fully fit to perform the duties of the Uniformed Branch of the Massachusetts State Police. The Commonwealth admitted that the statutory classification forced the retirement of officers who were fit to continue. This anomalous result led to the district court's conclusion that the operation of the classification was irrational.

After determining that the reasons advanced by the Commonwealth in support of its classification were insufficient, the court attempted to find justification for the statute on grounds such as its legislative history and the national experience relating to similar classifications. It finally considered

the possibility that the individualized testing lacked predictive validity at age 50. None of these factors supported the rationality of the classification. The district court was therefore correct in concluding that the operation of the classification is irrational.

The appellee's second argument analyzes the district court's reference to this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). The court did not employ the irrebuttable presumption doctrine in its decision. Its reference to *LaFleur* was proper because of this Court's extensive analysis in that case of mandatory discharge statutes, employee fitness and individualized testing, all of which are the central issues in this case. Of particular relevance is this Court's discussion in Part III of the *LaFleur* decision, which pertains to the operation of a statutory across-the-board fitness classification upon employees who had already been individually medically screened and classified as fit.

Appellee's final argument compares the state interest in maintaining its classification with the interest of the individual in retaining his employment. Appellee submits that the state interest is minimal. The individual interest, however, is substantial because the state's meritless classification results in grave difficulties in obtaining new employment at age 50. The argument concludes that strong public policy arguments, evidenced by the national and state legislative efforts to eliminate age discrimination, support the lower court's finding that the challenged classification is irrational.

ARGUMENT

I.

THE DISTRICT COURT WAS CORRECT IN DECIDING APPELLEE'S CLAIM IN TERMS OF THE RATIONAL BASIS TEST UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The appellee brought this action in the district court alleging that mandatory retirement for superannuation at age 50, pursuant to Mass. Gen. Laws ch. 32, §26(a), was a violation of his civil rights of due process and equal protection. He alleged that the statute requiring his mandatory retirement denied him due process because it created an unwarranted conclusive presumption that he was incapable of continuing his duties because of his age, whereas, in fact, he was fully fit to continue (A22, 23). He further alleged that the statute denied him equal protection of the laws because it had no rational relationship to any state interest in the effective operation of the Massachusetts State Police (A22).

Appellee argued that in ruling on his equal protection claim, the court should use a strict scrutiny standard because his mandatory retirement, based solely on his age and in disregard of his fitness, was based upon a classification which is suspect. Appellee contended that his mandatory retirement based upon age alone was an infringement of his fundamental right to employment. The appellee asserted that the challenged statute should be upheld only upon a showing by the state that it had a

compelling interest in maintaining the effecting law. Finally, appellee argued that even if the court determined that the lesser, rational basis, standard was the appropriate one, the statute still did not accord him equal protection of the laws (R. Appellee's Trial Brief at 4-35).

The district court did not adopt the appellee's contentions that a classification based upon age *per se* was inherently suspect or that the operation of the statute denied him a fundamental right to employment. Nor did the court adopt the appellee's due process claim that the statute created an irrebuttable presumption. *Murgia v. Massachusetts Board of Retirement,* 376 F. Supp. 753, 754 (D. Mass. 1974).

The court limited its inquiry to a single issue: whether the classification based on age 50 alone lacks a rational basis in furthering any substantial state interest. *Id.* at 754. The lower court did not adopt the strict scrutiny standard of review which is appropriate in cases where the subject statute employs a suspect classification[2] or interferes with a fundamental right.[3] Rather, it adopted the less rigorous rational basis test, as set out in this Court's opinion in *F. S. Royster Guano Company v. Commonwealth of Virginia,* 253 U.S. 412, 415 (1920), which the district court noted was quoted with approval by this Court in *Reed v. Reed,* 404 U.S. 71, 76 (1971). *See Stanton v. Stanton,* 95 S. Ct. 1373, 1377 (1975). In *Royster,* this Court articulated the rational basis test as follows:

2. *See, e.g., Brown v. Board of Education,* 347 U.S. 483 (1954).

3. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618 (1969).

> "It is necessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415.

The lower court's selection of the rational basis test for the analysis of the issue before it was appropriate. The rational basis test affords the state broad discretion. Under this test, the statute is presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425 (1961); *Lindsley v. Natural Carbonic Gas Company,* 220 U.S. 61, 78 (1911). The burden is upon the party challenging the statute to overcome this presumption. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 55 (1973). The district court fully recognized the presumption and the burden which is placed on the appellee to show the irrationality of the statute. 376 F. Supp. at 754, 756.

Although the statute before the lower court involved questions of age discrimination and denial of employment, which touch fundamental interests of the individual, it also involved elements of state economic and social regulation which are accorded a high degree of respect by the court. *See*

Dandridge v. Williams, 397 U.S. 471, 485-486 (1970). Also, the court must accord deference to a state in the selection of its own officers and agents. *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552, 557 (1946). In addition, it is a state's undeniable right to require high standards of qualification for its personnel. *See Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 239 (1957).

The appellants suggest in their first and second argument that the Court should not exercise even this deferential standard of review. The Commonwealth states, that because of the complex issues pertaining to mandatory retirement involved in this statute, the legislature should be free to establish these policies exclusive of judicial review.

The legislature may not so operate in total isolation. Even in cases which relate solely to issues of broad economic and social regulations and do not infringe upon rights so fundamental to the individual as employment and discrimination based on age, this Court has insisted that the statutory classification bear some rational relationship to the purposes of the statute. *See McGowan v. Maryland, supra,* 366 U.S. at 425, 426; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U.S. 582, 590 (1961).

A. The District Court Was Correct In Determining The Statutory Object Or Purpose Of Mass. Gen. Laws ch. 32, §26(3)(a) Was The Maintenance Of A Fit And Vigorous Massachusetts State Police.

The lower court applied the rational basis test to the challenged statute in a two-step procedure, wherein the court first determined the object or purpose of the legislation and then

measured this object against the classification to determine whether a rational relationship existed. 376 F. Supp. at 754, 755.

In determining the object or purpose of the legislation, the lower court looked to the language of the statute, *see Marshall v. United States,* 414 U.S. 417, 422-423 (1973), the entire statutory scheme, *Kotch, supra,* 330 U.S. at 557, the legislative history, *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* 366 U.S. at 584, 585, the interpretations placed on the legislation by the state courts, *Eisenstadt v. Baird,* 405 U.S. 438, 451 (1972), and facts properly the subject of judicial notice, *Lindsley, supra,* 220 U.S. at 79, *see Kahn v. Shevin,* 416 U.S. 351, 353 (1974).

In addition to these factors, the district court considered the purposes articulated by the state. *San Antonio Independent School District v. Rodriguez, supra,* 411 U.S. at 17; *McGinnis v. Royster,* 410 U.S. 263, 270 (1972). *See* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972). The Attorney General of the Commonwealth has purported to draw upon portions of the legislative history of the challenged statute and of the broad Massachusetts Retirement Statute in general, judicial decisions pertaining to related matters and various statistics and reports (Brief for Appellant at 15-26).

In the lower court the Attorney General suggested that early retirement improved the morale of the Uniformed Branch by fostering rapid promotions. New members could be promoted to fill the ranks vacated by those mandatorily retired under the statute. The court analyzed this alleged purpose and concluded

that it lacked substance. 376 F. Supp. at 754, 755. *See Eisenstadt v. Baird,* 405 U.S. 438, 448-449 (1972); *Weinberger v. Wiesenfeld,* 43 U.S.L.W. 4393, 4397 (U.S. March 18, 1975); *Wiesenfeld, supra,* at 4399 (concurring opinion of Rehnquist, J.). The district court said:

> "We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness. The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position. The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination *per se.*" 376 F. Supp. at 754, 755.

The court noted that it would have conceded the validity of the morale argument if officers not capable of carrying their full

load were to be retained, but concluded that this would not occur because of the fitness standards used by the state police. 376 F. Supp. at 754 n.5.

Appellants appear not to have challenged the lower court's treatment of these contentions and have not pressed these purported justifications in this Court.

The second statutory purpose advanced by the Commonwealth was of greater substance and pertained to the maintenance of personnel who were capable of performing the arduous and hazardous duties of the Uniformed Branch of the Massachusetts State Police.

The appellants continue to rely upon this statement of statutory purpose in their brief before this Court and have articulated the statutory objective as ". . . the need for physical strength, stamina and alertness from persons performing demanding public safety functions" (Brief for Appellants at 23-24). It is an undisputedly proper purpose for the state to require fit personnel. *Shelton v. Tucker,* 364 U.S. 479, 485 (1960). It was accepted as a valid state purpose by the court below. 376 F. Supp. at 754.

B. The District Court Was Correct In Finding That The Statutory Classification Was Irrational Because It Operated To Retire For Superannuation State Police Officers Who Had Been Administratively Declared Fit To Continue In Their Employment.

After the district court found a valid state purpose, it proceeded to the second step in the application of the rational

basis test, which is the determination of whether the purpose is in any way furthered by the statutory classification.

At the outset it was apparent that the age classification employed in the statute in this case is in some respects similar to the classifications used in that category of legislation which uses age as the determining factor in a broad range of circumstances.[4] Because of this similarity and because the lower court made reference in its decision to this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the appellants have erroneously overstated the impact of the lower court's decision upon age-based classifications. The appellants contend that the district court's decision is:

> "not only erroneous but . . . contains disturbing implications for the continued viability of the legislative process. The logical extension of the

4. Age is used as a criterion of selection and grouping of people for a wide variety of purposes. For example, Massachusetts law makes age a factor in the following areas, among others: (1) adoption, Mass. Gen. Laws ch. 210, §§1, 2; (2) criminal prosecution eligibility, M.G.L. ch. 119, §74; (3) consumption of alcoholic beverages, M. G.L. ch. 138, §34B; (4) driving motor vehicles, M.G.L. ch. 90, §§8A, 8B; ch. 90B, §26; (5) state employment, M.G.L. ch. 31, §5B; ch. 22, §9A; (6) private employment, M.G.L. ch. 112, §§55, 101; ch. 147, §24; (7) employment in dangerous occupations barred to minors, M.G.L. ch. 149, §§60 *et seq.*; (8) majority, M.G.L. ch. 4, §7; (9) marriage, M.G.L. ch. 207, §9; (10) jury duty, M.G.L. ch. 234, §1; (11) voting, Mass. Const. Amend., Nov. 3, 1970, art. III; (12) participation in boxing, M.G.L. ch. 147, §35; (13) sale or purchase of lottery tickets, M.G.L. ch. 10, §§24, 29.

Federal law also incorporates age as a qualification for many purposes. For example: (1) employment, 5 U.S.C. §§2105, 3307; (2) selection for military service, App. 50 U.S.C. §§453, 454; (3) naturalization by petition, 8 U.S.C. §1445; (4) programs for youth — job corps and youth conservation corps, 42 U.S.C. §2713; 16 U.S.C. §1702; (5) sale of firearms, 18 U.S.C. §22(b)(1); (6) old age insurance benefits, 42 U.S.C. §402(a)(2); (7) increased sentences for special dangerous offenders, 18 U.S.C. §3575.

> holding would subject every exercise of legislative line-drawing to judicial revision if in fact individualized determinations could be made, particularly where the results of those determinations would show that the line drawn did not result in the perfect classification of every affected individual." (Brief for Appellant at 42-43.)

An examination of the facts of the case and the lower court's careful reasoning shows that the court's decision is not a broad attack on legislative classification based upon age, mandatory retirement laws, or any other legitimate legislative line-drawing activity; nor does the lower court's reference to the *LaFleur* decision indicate that it was relying upon the irrebuttable presumption doctrine as the basis for its decision. Despite appellants' statements to the contrary, the lower court does not employ the irrebuttable presumption doctrine as an engine for the destruction of mandatory retirement statutes. *See Weinberger v. Salfi*, 43 U.S.L.W. 4985, 4992 (U.S. June 26, 1975).

The court below was careful to note that its decision declaring Mass. Gen. Laws ch. 32, §26(3) unconstitutional and void does not represent a judicial rejection of age-based classifications or of the legislative power to create such classifications. The court specifically noted examples of instances where legislative line-drawing is appropriate and constitutionally beyond dispute.

> "We fully accept the necessity of choosing arbitrary standards in certain and indeed in many

situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, Oregon v. Mitchell, 1970, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272, even though the particular age selected may seem indifferentiable from other ages in proximity to it. *Id.* at 294 (Stewart, J., concurring in part and dissenting in part); *see id.* at 243-246 (Brennan, White and Marshall, JJ. concurring in part and dissenting in part). *See also, e.g.,* United States v. Duncan, 9 Cir., 1972, 456 F.2d 1401, 1405 (minimum age for jury service), vacated on other grounds, 409 U.S. 814, 93 S. Ct. 161, 34 L.Ed.2d 72; Smith v. United States, 9 Cir., 1970, 424 F.2d 267 (selective service age limitations); Scarangella v. Commissioner of Internal Revenue, 3 Cir., 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent)." 376 F. Supp. at 755.

It was because the peculiar factual circumstances surrounding the application of this particular statute, when viewed in the light of the rational basis test, showed that, in this instance, such a classification not only failed to serve the statutory purpose; it actually frustrated it. As a result, the court found that the statute did not survive constitutional scrutiny. 375 F. Supp. at 756. The distinguishing feature of this case as compared to other situations where age-based classifications are applied is that the group subject to the statutory classification had already been prescreened and preclassified for precisely the

purpose which the statute sought to achieve. It was the fact of prescreening and preclassification which the court found made the statutory classification irrational.

The appellants' position in both the court below and in this Court, is that once the validity of the statutory purpose is recognized, and the need for some sort of classification is accepted, the actual legislative determination setting that classification should not be questioned. The appellants argue in their brief that once it is conceded that (a) there is a general relationship between aging and decreased physical ability and (b) that the duties of state police may justify an early mandatory retirement age, then " . . . the existence of these two elements alone satisfied whatever burden they bore to demonstrate the rationality of the legislative determination, and required the district court to uphold the constitutionality of the challenged statute." (Brief for Appellant at 46).

The district court did not agree that its duty to review this statute was so narrowly circumscribed. It insisted that the legislative classification must bear some rational relationship to the purposes of the statute. The court said:

> "But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other." 376 F. Supp. at 755.

In insisting that the actual classification bear a rational relation to the purpose of the statute, the lower court was correct. *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). *See McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The appellants then argue that " . . . the record of this case supports a finding that retirement of Uniformed State Police officers at age 50 is a rational choice well within the bounds of legislative discretion" (Brief for Appellant at 46). To the contrary, the record supports the lower court's finding that the operation of the classification is irrational and frustrates the purpose of the statute.

The Commonwealth concedes that the operation of its classification " . . . involves the inevitable loss of individual public employees who remain willing and able to work beyond the prescribed retirement age" (Brief for Appellant at 19). If, as the lower court found, the operation of the classification resulted in the loss, not of an occasional individual who is fit and willing to continue, but of all such individuals, then its operation is irrational. A state has no interest in the operation of a legislative classification which achieves results which it does not desire. *See Bell v. Burson*, 402 U.S. 535, 540 (1970).

The record below reveals the existence of an elaborate medical screening system uniformly applied to every officer in the Uniformed Branch throughout his career. This medical screening system is established by regulation under the statute creating the Massachusetts State Police (A193-256). All initial applicants must be found physically qualified to become state police officers. This is done by submitting the applicant to an enlistment physical examination (A146). This examination is based upon the examination used by the United States Army to

determine enlistment fitness (A130). If an applicant is not found fit, he is not offered enlistment (A128-129). The initial enlistment term is for two years (F12). Thereafter, if the officer wishes to reenlist, he must submit himself to a reenlistment physical examination (F13). This is the same examination as the enlistment examination (F23). If a member is found unfit under the reenlistment physical examination. he must obtain a waiver to continue his service or be mandatorily retired.[5] Beginning at age 40 and continuing every year thereafter until the officer is retired, he is given the same physical examination on an annual basis with the added requirements of an electrocardiogram and tests for gastro-intestinal bleeding (A148). As in the case of the candidate for reenlistment, an over-40 officer found unfit must obtain a waiver to continue in service, or be mandatorily retired (A160).

The purpose of this scheme is to eliminate from service state police officers who have been found unfit to perform their duties. An officer who passes the physical examination has been determined by the Massachusetts State Police to possess all of the physical requirements needed to meet the physical demands of his job. Thus, the physical examination provides the criterion for continued service. The Commonwealth has admitted that:

> "To qualify to perform the duties of the Uniformed Branch of the Massachusetts State Police a member must be found physically fit. *When a member passes his re-enlistment or annual physical he is found to be qualified to*

5. Waivers are issued at the discretion of the Commissioner of Public Safety. At the time that this case was brought approximately 12 men out of a force of 880 continued to serve on waivers (A160).

> *perform all of the duties of the Uniformed Branch of the Massachusetts State Police"* (F55) (emphasis added).

The Commonwealth further admitted that:

> "A member's physical condition as it relates to his ability to perform the duties of the Uniformed Branch is determined at annual and/or re-enlistment physical examinations; *members who pass the physical examinations are determined able to perform the duties of the Uniformed Branch"* (F60) (emphasis added).

Because this classification continues to be applied to the officer throughout his career in the Uniformed Branch, it means that in order to continue to serve he must continue to meet the fitness standards. If the officer does not, he must face mandatory retirement or obtain the rarely granted waiver to continue on limited duty. The result of this intensive and continuous medical screening is to produce a group which is at all times wholly fit to perform all of the duties of the Massachusetts State Police.

The Commonwealth does not question the effectiveness of its medical screening process to produce a fit membership. *Compare Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863-864 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). Nor does it dispute the necessary conclusion that an officer who is age 50 and is serving on full duty is fully fit. *See, e.g., Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd.*, 420 U.S. 940 (1975); *McIlvaine v. Pennsylvania*, 6 Cmwlth. 505, 295

A.2d 630 (1972), *aff'd.*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974); *Weiss v. Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd.*, 411 F.2d 846 (2d Cir. 1972). It is at this point, however, that the statutory classification which is the subject of this case comes into play. It operates to retire on the grounds of superannuation the officer who is admittedly fit. The Commonwealth has stated that this is the effect of the application of the statutory classification:

> "Members who pass the physical examinations and are fully qualified to continue in service must retire if they are fifty years of age and have twenty years of service" (F63).

Given these undisputed facts, the question before the district court, then, was whether there was a rational basis for a statutory classification established for the purpose of eliminating superannuated officers, which operated in practice to eliminate only members who had been prescreened and were admittedly fit. It is this fact of intensive prescreening of the employees to isolate and dismiss the unfit which distinguishes this case from the usual situation where there is no such prescreening.

The appellants have suggested that the only evidence which the appellee introduced " . . . related to his own generally healthy condition " (Brief for Appellant at 4). It is true that appellee was found fully qualified to continue his duties as a member of the Uniformed Branch of the Massachusetts State Police (F78).

But to suggest, as appellants do (Brief for Appellant at 47), that this is merely an isolated instance where the classification

does not fit the facts, is to deny the existence of the actual operation of the classification. The fact of the matter is that not only the appellee, but every single member of the Uniformed Branch who is serving in full duty status at age 50, had to have been determined to be fully " . . . qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police" (F55).

The issue before the district court, therefore, pertained not to a statutory classification which misclassified a single individual or even a minority which might have been included. It was not a situation where the line drawn ". . . leaves out some who might well have been included." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Rather, the operation of the statutory classification upon the membership, which already had been thoroughly screened from the outset of their service and classified so as to remove the unfit, is such that the statutory classification operates only to retire for superannuation those members who are fit.

C. No Rational Purpose Could Be Assigned To The Operation Of The Classification Based Upon The Legislative History, Medical Data Or Other Evidence In The Record.

The court below was not satisfied to conclude its search for rationality at this point. It felt that there may have been a rational basis for the statute despite its effect of retiring fit individuals. 376 F. Supp. at 755. The court then looked to the question of the predictive validity of the existing medical screening system, questioning its reliability for a person of age 50. *Id.* The court put it this way:

> "We must look therefore, in another direction for reasonableness — is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?" 376 F. Supp. at 755.

The record suggested no basis upon which it could be determined that the prognosis based upon testing became less reliable at age 50.[6]

The district court took note of the comprehensive study by the Federal Aeronautics Administration that led to its establishment of age 60 for the mandatory retirement of commercial pilots. *Air Line Pilots Association International v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1962). The study in that case indicated that the predictive validity of examinations relating to heart attacks and strokes did not diminish until about age 60. 276 F.2d at 898.

In its brief for this Court the appellants have recited extensively from the legislative history of the challenged statute and from the legislative history of the entire legislative scheme of which the statute is a part. Appellants state the ". . . history and context of this legislative determination establish its rationality."

6. Dr. Dawber testified that the predictive validity of examinations did not decrease (A87). The Surgeon General said that he had no evidence on which to make such a judgment (A176). He conceded, however, that some men over 50 were capable of performing the duties of the Uniformed Branch (A173). The statistics which the Commonwealth produced suggested that there would be no reduction in the predictive validity of the examination. 376 F. Supp. at 756 n.7.

(Brief for Appellant at 45). It is appellee's position that this legislative history lends no support to the age classification.[7]

Although the state police had existed in Massachusetts from 1865,[8] the first retirement statute pertaining to the state police was enacted in 1911 and provided for retirement only in the case of incapacity after 20 years service. Act of July 14, 1911, ch. 675 [1911] Mass. Acts and Resolves 800.[9]

The mandatory retirement age of 50 makes its first appearance in the Act of August 12, 1939, ch. 503, §3 [1939]

7. In its brief at page 24, the Commonwealth set out a quotation from a Special Commission Report to the Legislature in 1937 as evidence of a "widely accepted premise [of] the necessity for younger men to perform the job." The legislation under study by the Special Commission would have permitted the Commissioner of Public Safety to selectively retire officers who had become incapacitated for further service beginning at age 45. The Commission rejected the proposed legislation because of its cost and added the observation that the state police logically should be included with other state or local employees who perform hazardous duties in Group I. The Group I retirement age was 65 (Mass. H. Doc. No. 1582 at 9-13 [1938]).

8. Act of May 16, 1965, ch. 2349 [1865] Mass. Acts and Resolves 631.

9. Mass. Acts and Resolves 800, Section 1 provides as follows:

> "Any member of the district police, who in the judgment of the governor, is disabled for useful service in that department, and who is certified by a physician, designated by the governor, to be permanently incapacitated either physically or mentally, by injuries sustained through no fault of his own, in the actual performance of his duty, for the further performance of his duty in the department, and any member of the said department who has performed faithful service for the commonwealth for not less than twenty years, and is in the judgment of the governor incapacitated for further service as a member of the said department, shall, if he so requests, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement."

Mass. Acts and Resolves 737. There is no legislative history as to the basis for the selection of this age for mandatory retirement rather than the ages of 65 and 70 which had been used and which continues to be used at present.[10] The use of this age for

10. The Commonwealth correctly suggests that the impetus for the 1939 legislation may have come from the proposal of the Commissioner of Public Safety in 1937 to create a separate retirement fund for state police officers (Brief for Appellant at 31). The Commonwealth is in error, however, in asserting that this proposed legislation called for " . . . a mandatory retirement age of 45." *Id.* The legislation did not require mandatory retirement for members at age 45, but provided the Commissioner with the power to selectively retire members who became permanently incapacitated at and after age 45. The proposal provided:

> "Any member of the division of state police of the department of public safety appointed thereto under the provisions of section nine A of chapter twenty-two, who has performed faithful service therein and who in the judgment of a rating board consisting of the surgeon-general of the commonwealth, the commissioner of public safety, or such members of their respective departments as may be designated by them, is permanently incapacitated for active service by reason of injuries sustained or illness incurred through no fault of his own in the actual performance of duty, shall be retired and shall annually receive a pension from the commonwealth equal to not less than one half nor more than three fourths of the compensation including maintenance allowance paid to him at the time of his retirement, the amount of said pension within the stated limits to be determined by the said rating board and the comptroller; and any member so appointed who has performed faithful service in the said division for not less than twenty years and who has attained the age of forty-five, and who in the judgment of the commissioner is incapacitated for further service in the division, may be retired, and shall annually receive a pension from the commonwealth equal to one half of the average compensation including maintenance allowance paid to him during the last three years of his service. Any member of the said division appointed under the said section nine A who is a veteran as defined in section fifty-six may upon notice seasonably given elect to receive the benefits of the provisions of this chapter which relate to the retirement of veterans.

As such, the proposed legislation operates much like the present disability retirement statute, M.G.L. ch. 32, §26(2).

mandatory retirement does not appear anywhere else in Massachusetts legislation. The police and firemen of the cities and towns of the Commonwealth are mandatorily retired at age 65.[11] The age 50 retirement provision has found little subsequent support.[12] Whatever historical basis which supported the initial classification may no longer exist.[13]

11. "No permanent member of said department shall remain in service after he has attained the age of sixty-five." Mass. Gen. Laws ch. 32, §§81A(d), 83A(d).

12. A special commission reported to the legislature in 1953:

> "The Commission has been disturbed by a trend in recent years to the premature retirement of public employees. There has been a tendency for public employees, who have fulfilled the minimum requirements under the law, to retire at an early age, while in good physical condition . . . . The Commission feels every effort should be made to retain in the public service all physically fit and mentally alert employees until they reach the age of sixty, at least. The early retirement of public employees has not only deprived the system in which they have been engaged of valuable service, but also has proven to be an expensive luxury." Mass. H. Doc. No. 2737, at 11-12 (1953).

A special commmission to study and revise the laws relative to retirement in 1955 reported:

> "It is believed that a different treatment between Groups A, B and C, as to normal retirement age, is proper because of differences in occupational requirements. Ages 65 and 60 appear to be proper for Groups A and B, respectively, and, although some arguments for raising the normal retirement age above 50 for uniformed members of Group C appear to have merit, it was felt that a continuation for them of age 50 for the present might be justifiable. However, it is recommended that the normal retirement age for Group C be reviewed in the future . . . . The present provisions appear to be reasonable, except that, as in the case of normal retirement age, there might be some argument for raising age 50 for Group C, particularly since there is no variation for that group between normal retirement age and compulsory retirement age. It is believed that basically, employees should be allowed to continue in

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Like the Court in *Quesada*, the lower court also looked to the mandatory retirement ages for state police established by other jurisdictions in order to find possible support for the age of 50 established in the Massachusetts statute. 376 F. Supp. at 756. Here again, there was no basis for the retirement age. Unlike the facts in *Quesada*, which supported mandatory retirement ages for pilots at age 60, 276 F.2d at 898, the record showed that no other state retired its state police at age 50. The earliest mandatory retirement age used by other states and the federal government was age 55.[14]

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> employment as long as they are able to properly carry out the duties of their occupation. It is in the interest of the economy of the country as a whole to have persons employed rather than unemployed." Mass. H. Doc. No. 2500, at 24-25 (1955).

13. On January 18, 1973 Richard E. McLaughlin, the Secretary of the newly created Executive Office of Public Safety, submitted his report pertaining to the reorganization of the various departments placed under his jurisdiction. Among these was the Massachusetts State Police, for which he proposed the following:

> "The mandatory retirement age of the state police will be increased from age 50 to 55. This will enable the Police and Security Administration to utilize the services of trained experienced police officers longer. The present retirement age of state police was established in 1919 when officers rode horses and motorcycles on predominately unpaved roads. These conditions no longer exist, thus we need no longer be bound by the present retirement age.
>
> This will result in savings to the taxpayer of $120,000 the first year. This savings will multiply each year so that in five years a total of $1,185,000 savings will result." (Plan for Reorganization at 2-3).

14.

Alabama:	60 years, Code of Alabama recompiled, Title 55, §460(d).
Alaska:	55 years, Alaska Statutes, Title 39, §39.55.680(11).
Arizona:	65 years, Arizona Revised Statutes Annotated, Title 38, §781.01.
Arkansas:	65 years, Arkansas Statutes Annotated, Title 42, §455C.

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D. The Commonwealth's Interest In Providing Financial Security For Its Retired Employees Is Not Altered By The Holding Of The District Court.

The Commonwealth, in its brief to this Court, has suggested that there is an auxiliary purpose to the challenged statute which is the provision of financial security for public employees who

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California:	60 years, Deering's Califo.nia Codes Annotated, Art. 2 §20980.
Colorado:	65 years, Colorado Revised Statutes, Article 6, §24-50-204.
Connecticut:	70 years, Connecticut Statutes Annotated, Title 5, ch. 66, §5-162.
Delaware:	55 years, Delaware Code Annotated, Title 11, §8323.
Florida:	65 years, Florida Statutes Annotated,Chapter 13, §321.18
Georgia:	No age, Georgia Code Annotated, Title 92A, §§217, 218 repealed by Acts of 1949, p. 70.
Hawaii:	70 years, Hawaii Revised Statutes, Title 7, ch. 88, §88-63.
Idaho:	60 years, Idaho Code, Chapter 11, §59-1310(1).
Illinois:	60 years, Illinois Annotated Statutes, Chapter 121, §307.12-1.
Indiana:	70 years, Burn's Indiana Statutes Annotated (Code Edition), Title 10, §10-1-2-1.
Iowa:	65 years, Iowa Code Annotated, Chapter 6, §97A-6(1, b).
Kansas:	60 years, Kansas Statutes Annotated, Article 21, §§74-4971, 4975.
Kentucky:	55 years, Kentucky Revised Statutes, Title 16, §16.505(15).
Louisiana:	65 years, L.S.A. Revised Statutes, Title 23, §40:1426-1.
Maine:	25 years service, Maine Revised Statutes Annotated, Title 5, §1121(c).
Maryland:	64 years, Annotated Code of Maryland, Article 88B, §53(c).
Michigan:	56 years, Michigan Compiled Laws Annotated, Chapter 28, §105.
Minnesota:	No age, Minnesota Statutes Annotated, Chapter 352B, §352B.20.
Mississippi	60 years, Mississippi Code Annotated, Title 20, ch. 2, §8090-56.
Missouri:	55 years, Missouri Revised Statutes, Title VIII, §104.080.
Montana:	60 years, Montana Revised Statutes, Title 31, §216.
Nebraska:	60 years, Revised Statutes of Nebraska, Chapter 60, §452.
Nevada:	55 years and 30 years service, Nevada Revised Statutes, Chapter 169, §125.
New Hampshire:	65 years, New Hampshire Revised Statutes Annotated, Chapter 103, §12.

(Cont'd)

are retired. In describing the statute, the appellants have noted its dual objectives as follows:

> "Massachusetts like all other states and the federal government, has pursued two objectives: maintenance of an effective public labor force

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New Jersey:	55 years and 25 years service, New Jersey Statutes Annotated, Title 53, §5A-8.
New Mexico:	61 years, New Mexico Statutes Annotated, Chapter 39, §2-6(B).
New York:	62 years, McKinney's Consolidated Laws of New York Annotated, Volume 18, §228.
North Carolina:	65 years, General Statutes of North Carolina, Chapter 135, §14.
North Dakota:	60 years, North Dakota Century Code Annotated, Title 39, §03A.18.
Ohio:	55 years, Ohio Revised Code and Service Annotated, Title 55, §5505.16.
Oklahoma:	55 years, Oklahoma Statutes Annotated, Title 47, §2-305(a).
Oregon:	60 years, Oregon Revised Statutes, Chapter 71, §65(d).
Pennsylvania:	60 years, Pennsylvania Statutes Annotated, Title 17, §1725-102(14).
Rhode Island:	60 years, General Laws of Rhode Island, Title 42, §28-22.
South Carolina:	70 years, Code of Laws of South Carolina, Title 61, §61-103(2).
South Dakota:	55 years, South Dakota Compiled Laws Annotated, Title 3, §3-12-47(35).
Tennessee:	60 years, Tennessee Code Annotated, Chapter 39, §8-3905(b).
Texas:	65 years, Vernon's Civil Statutes of the State of Texas Annotated, Title 109, Art. 6228a, §5.A.
Utah:	55 years, Utah Code Annotated, Title 49, §49-11-9(35).
Vermont:	65 years, Vermont Statutes Annotated, Title 3, §455(13)(2).
Virginia:	65 years, Code of Virginia, Title 51, §51-150.
Washington:	60 years, Revised Code of Washington, Title 43, §43.250(1).
West Virginia:	55 years, West Virginia Code, Chapter 15, Article 2, §15-2-28.
Wisconsin:	55 years, Wisconsin Statutes Annotated, Title VI-A, §§41:02(23), 42.11.
Wyoming:	65 years, Wyoming Statutes, Title 31, §31-11.7(d).
Federal Law Enforcement and Firefighter Personnel:	55 years or 20 years service, whichever comes later, 5 U.S.C. §8335(g).

and provision of financial security for those who have served the state as public employees" (Brief for Appellant at 12).

The Commonwealth did not suggest in the court below that this auxiliary purpose of providing for the financial security of retired employees would lend rational support to the statutory classification which operated to retire at age 50 state police officers who had been found fit to continue employment. It does not appear to make the suggestion here.

This auxiliary purpose is significant, however, because it reveals the financial interest of the state in managing its pension system. Where state economic regulation is involved, judicial deference is accorded the legislative classification especially where the state is attempting to distribute its fixed revenues among competing interests. *Dandridge v. Williams,* 397 U.S. 471, 485-486 (1970). The elements of economic regulation in this case give added support to the lower court's selection of the rational basis test as the test for measuring this legislation. The state has a legitimate interest in protecting itself from increased expenses. *See Vlandis v. Kline,* 412 U.S. 441, 445 (1973). It also has a legitimate interest in making its programs self-sustaining where possible. *Geduldig v. Aiello,* 417 U.S. 484, 496 (1974).

The appellants do not suggest, however, that as a result of the lower court's decision any greater financial obligations will be placed on the state's retirement system. *See Jemenez v. Weinberger, supra,* at 633. Indeed, the opposite effect may result. Under the court's decision, able-bodied officers would

continue to make contributions into the fund, rather than being mandatorily retired and drawing out pension benefits.[15]

Even if this were not the result, the lower court's decision cannot in any way bind the legislature to make increased payments. Under Massachusetts law, a change in the mandatory retirement age does not give rise to a legal obligation for increased retirement benefits. *McCarthy v. Sheriff of Suffolk County,* 322 N.E. 2d. 758 (Mass. 1975). In that case the Supreme Judicial Court of Massachusetts held that the legislature has broad powers to regulate, enlarge, limit or terminate the duties or tenure of state officers as public emergency or policy may require. *Id.* at 761. Such legislative action may be freely taken provided only that the level of benefits originally promised a person entering the employment of the Commonwealth are preserved in substance and not modified downward. *Id.* at 762.

It appears, therefore, that the state's financial stake in the decision of the lower court is minimal and to the extent that it exists, the state is able to protect itself from any increased financial burden.

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15. Since the date of the lower court's decision, Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready have obtained restraining orders to remain on the job. *Carter v. Commonwealth,* Civil No. 74-487 (Plymouth Sup. Ct., Oct., 1974); *McGuire v. Commonwealth,* Civil No. 1330 (Bristol Sup. Ct., March 21, 1975); *Ready v. Commonwealth,* Civil No. 758 (Bristol Sup. Ct., Dec. 5, 1974).

II.

THE DISTRICT COURT DID NOT USE THE IRREBUTTABLE PRESUMPTION DOCTRINE IN HOLDING THAT MASS. GEN. LAWS CH. 32, §26(3)(a) VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In the last paragraph of its opinion, the lower court made the following reference to this Court's opinion in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974):

> "On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy." 376 F. Supp. at 756.

The appellants claim that the lower court has erroneously applied the irrebuttable presumption doctrine to the facts in this case. The appellants assert that:

> "The irrebuttable presumption doctrine has no place in assessing the constitutional validity of the Massachusetts Mandatory Retirement Age for Uniformed State Police." (Brief for Appellant at 33).

The appellants present a lengthy analysis of this Court's recent opinions which have used the irrebuttable presumption doctrine, distinguishing the cases from the one now before this Court. (Brief for Appellants at 34). Whether the irrebuttable presumption doctrine is appropriate for the decision of this case is not in issue because the district court did not employ that doctrine in its analysis.

Together with the equal protection claim, the appellee raised the issue of denial of due process of law in the lower court and, relying upon this Court's decision in *Cleveland Board of Education v. LaFleur, supra,* asserted that the mandatory retirement statute created an irrebuttable presumption which should be invalidated.[16]

The district court rejected these contentions and never reached the due process issue. It relied exclusively upon the Equal Protection Clause. At the outset of its opinion the court announced that the single issue it would reach pertained to appellee's equal protection claim:

> "We reach only one issue, that a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest." 376 F. Supp. at 754.

Later the court addressed itself to the type of scrutiny it would apply under the equal protection analysis in the following terms:

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16. (R. Amended Complaint at 5.)

> "Our first question could be the standard to apply in testing the constitutionality of the statute; whether because the plaintiff's right to employment may be a fundamental interest or because there might be a suspect classification, the burden is on the state to show a compelline interest, or whether, on the other hand, the burden is on the plaintiff to show a lack of rational basis." 376 F. Supp. at 754.

The court quoted from two cases which apply the rational basis standard:

> " . . . we find that mandatory retirement of officers at 50 years of age bears no fair and substantial relation to the object of the legislation, *F.S. Royster Guano Co. v. Virginia*, 1920, 353 U.S. 412, 415, 40 S. Ct. 560, 64 L.Ed. 989, quoted in *Reed v. Reed*, ... " 376 F. Supp. at 754.

Nowhere in its opinion does the lower court engage in any analysis of the irrebuttable presumption doctrine or application of that doctrine to the facts of the case. There is not any mention of the term irrebuttable presumption anywhere in the opinion. The court's refusal to apply the irrebuttable presumption doctrine appears to have been correct in light of *Weinberger v. Salfi*, 43 U.S.L.W. 4785, 4992 (U.S. June 26, 1975).

A. The District Court's Reference To Cleveland Board Of Education v. LaFleur Was Appropriate.

The lower court cited the *LaFleur* decision not for the purpose of invoking the irrebuttable presumption doctrine, but rather for the reason that this Court's discussion of the operation of mandatory discharge statutes was relevant to the issues in the present case.

Appellants concede the factual similarity between the cases as to the operation of the statute. (Brief for Appellants at 39). In both cases the subject statute set arbitrary cutoff dates for being terminated from public employment regardless of individual capacity. In both the cases the state had undisputedly legitimate state interests in regulating the supply of its services, whether it was in eduction, as in the case of *La Fleur*, or police services, as in the present case. In both cases a justification for the rule was the state's legitimate interest in maintaining the physical fitness and capability of its employees.[17] 414 U.S. at 643; 376 F. Supp. at 754. In *LaFleur*, as in this case, the medical evidence showed that " . . . the ability of any particular [individual] to continue at work past any fixed time . . . is very much an individual matter." 414 U.S. at 645. The opinion of the majority in *LaFleur* held that the challenged

17. In both cases there also appears to have been elements of "outmoded taboos" in the original drawing of the rules. In *LaFleur*, the taboos pertained to pregnancy. In the present case the taboos pertain to misconceptions about age. The scant legislative history suggests that rather than relying on any specific scientific or factual data the legislature adhered to a common misconception that men at age fifty are too old to perform the duties of a state police officer. *Cf. Some Irrational Beliefs About Retirement in the United States, Indus. Gerontology* 23 (1974); Quirk and Skinner, *ICHS: Physical Capacity, Age and Employment*, 19 *Indus. Gerontology* 49 (1973).

rules could not pass muster under the Due Process Clause of the Fourteenth Amendment, but in so holding noted that the rules were "wholly arbitrary and irrational" and "serve[d] no legitimate state interest . . . . " *Id.* at 650. These terms are often used by this Court in an equal protection context. The rules under review in *LaFleur* and the statute under review in this case are similar in many respects. The lower court could properly conclude that regulations which have such serious shortcomings under the Due Process Clause might have similar shortcomings under the Equal Protection Clause. Further, Justice Powell in his concurring opinion noted the propriety of an equal protection analysis to the facts in *LaFleur*. *Id.* at 651.

In *LaFleur*, this Court concluded that because of the infringement upon the fundamental right of procreation by the mandatory leave regulation, the school board was required to adopt a less sweeping regulation incorporating some measure of individualized testing. This Court said:

> "The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty in support of their legitimate goals." *Id.* at 647.

The appellants have warned that the lower court's reference to *LaFleur* may cause the extension of the opinion to require individualized testing in every instance of legislative line-drawing. (Brief for Appellants at 43). In contrast to this Court's opinion in *LaFleur*, however, the district court did not require the retirement board to institute individualized testing, nor did it

require the retirement board to alter the existing administrative procedures. The opinion required only that the legislative line-drawing be responsive to administrative determinations that were already the order of the day. 376 F. Supp. at 756.

Support for the district court's decision in this regard is set out in Part III of this Court's decision in *LaFleur*. 414 U.S. at 648. That section dealt not with the mandatory leave provision, but with the rules regulating eligibility to return to work. The Court decided that the regulations contained constitutionally acceptable medical and next-semester eligibility provisions. *Id.* at 648, 649. In one instance, however, the Court found that the regulations required the mother to wait until her child reached the age of three months before the return rules began to operate. *Id.* at 648.

In attempting to discover a reasonable justification for this supplemental limitation, the Court suggested that teachers fitness may have been the basis. It noted, however, that such a purpose suffered from " . . . the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules." *Id.* at 649. The Court added that the application of the presumption was "patently unnecessary" because the state's interest in having a fit teacher was already fully protected by the requirement that she obtain a physician's certificate or medical examination. *Id.* The Court concluded that the statute, insofar as it embodied the three-month age provision, was wholly arbitrary and irrational and that the age limitation served no legitimate state interest. *Id.* at 650.

That conclusion is significant in the present case because of the Court's finding that the rule purporting to regulate the physi-

cal fitness of the employees was irrational, not because of the application of the irrebuttable presumption doctine, but, rather, because all relevant data regarding fitness was already available due to individualized tests. Given the medical data that the employee was fit, that portion of the rule which sought to establish fitness by some arbitrary standard, and in disregard of the existing data, could not withstand constitutional scrutiny. *Id.* at 649-650.

Precisely the same circumstance exists in this case. The state's interest in having fit state police officers is already fully protected by the administrative requirement that he annually be found fit to perform his duties. The district court could properly find that no additional protection could be added by the application of the mandatory retirement provision contained in Mass. Gen. Laws ch. 32, §26(3)(a).

III.

THE INTEREST OF APPELLEE IN RETAINING HIS EMPLOYMENT WITH THE MASSACHUSETTS STATE POLICE FAR OUTWEIGHS THE INTEREST OF THE COMMONWEALTH IN RETIRING HIM AT AGE 50.

A. Age-Based Classifications Suggest The Propriety Of A Level Of Judicial Scrutiny Which Weighs Or Compares The State Interest In Promoting The Classification With The Nature Of The Personal Rights Which The Classification Endangers.

This Court has suggested that the ultimate test of the validity of a statute under the Equal Protection Clause is a balancing of state interests and individual rights.

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey v. Doud,* 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co. v. Ellis,* 165 U.S. 150 (1897); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. *Brown v. Board of Education,* 347 U.S. 483 (1954); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). The essential inquiry in all of the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? *Weber v. Aetna Casualty & Surety Co., supra,* 406 U.S. at 172-173."

See Vlandis v. Kline, supra at 458-459 (White, J., concurring in judgment); *San Antonio Independent School District v. Rodriguez, supra* at 98-99 (Marshall, J., dissenting); *Gunther, supra,* 86 Harv. L. Rev. 1 (1972).

The state's interest in maintaining the arbitrary classification is small. The purposes of such a classification in

maintaining a fit and vigorous force are met by the physical examinations which permit the state to disqualify the unfit from continued service. Nor is the Commonwealth's continued operation of its state police force seriously disrupted by the lower court's decision. It is not required to institute any new administrative procedures or incur any additional financial burden. It retains the existing medical screening procedures to separate unfit members. Members may continue to voluntarily retire after 20 or more years service.[18] The legislature may reinstitute a mandatory retirement statute so long as it falls within the range of ages which have some rational relation to the purpose of the statute.[19] *See Stanton v. Stanton, supra.*

The district court said:

> "Whether we would reach the same result if the statute selected a more customary retirement age is not before us. With great respect to Mr. Justice Rehnquist, dissenting in *Cleveland Board of Education v. LaFleur,* ante, we would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument." 376 F. Supp. at 756 n.9.

18. Mass. Gen. Laws ch. 32, §28A.

19. The advisability of having a two-tiered retirement system to permit voluntary retirement at an earlier age and require mandatory retirement at a later age was noted in the Special Report of the Retirement Law Commission, Mass. H. Doc. No. 5900 (1973).

To be balanced against the interest in maintaining the classification are the interests of the individual. The court below did not adopt the appellee's claim that his right to continued employment was a fundamental right. The district court did find, however, that the appellee had a sufficient interest in maintaining his employment so that it could not be taken from him irrationally. 376 F. Supp. at 754.

B. Appellee Has A Protected Interest In His Continued Employment.

Appellants have argued that because Mass. Gen. Laws ch. 32, §26(3) was in effect when appellee joined the Massachusetts State Police in 1948 he had no expectancy for job continuity beyond age 50 and therefore he should be foreclosed from asserting his claim (Brief for Appellant at 40). Appellants rely upon this Court's opinion in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). Appellants' reliance on that case is misplaced. It involved the Due Process Clause of the Fourteenth Amendment and pertained to the point at which a person may claim his right to procedural due process.

The issue in this case does not pertain to the application of procedural due process rights. The district court did not use a due process analysis. Its analysis was under the Equal Protection Clause.

Further, even if it were held that appellee must show some protected interest in his continued employment in order to make his claim under the Equal Protection Clause, he has done so. This Court suggested in *Roth* that where denial of

reemployment involves interference with liberty or property there is a protectable interest under the Due Process Clause. *Roth, supra* at 571. Appellee was able to show that his denial of reemployment involved interference with his liberty and his property interests. This Court has said that there is an interference with liberty where the ". . .State, in declining to reemploy the respondent, imposed upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573. In this case the appellee was denied reemployment as a police officer because of superannuation. Mass. Gen. Laws ch. 32, §26(3) (R. Letter of Board of Retirement to Robert D. Murgia). This is a characterization of the appellee as unfit and incapable of performing his job. Clearly, the opportunities for him to obtain reemployment in his chosen profession of police officer are severely limited. It is not likely that any police department will hire an individual for new employment when the state has characterized him as superannuated for state police work.

Appellee also has a claim of entitlement to his job. He was hired under Mass. Gen. Laws ch. 22, §9A. That statute provides that after six years of service he may not be denied the right to reenlistment, provided he passes the reenlistment physical examination. This he has done and therefore he has a claim of entitlement for continued employment under Section 9A.

There are, in addition, broader considerations which give substance to the appellee's claim in this case. Although his right to employment may not be one which is specifically defined in the Constitution so as to require classification as a fundamental right, *San Antonio, supra,* nevertheless, the right to employment

has its roots in the Constitution and is of vital importance to the individual. *See, e.g., Arnett v. Kennedy,* 416 U.S. 134 (1974); *Roe v. Wade,* 410 U.S. 113, 168 (1973) (Stewart, J., concurring); *San Antonio Independent School District v. Rodriguez, supra* at 31; *United States v. Robel,* 389 U.S. 258, 270 (1967); *Greene v. McElroy,* 360 U.S. 474, 492 (1959); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 238-239 (1957); *Peters v. Hobby,* 349 U.S. 331, 352 (1954); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Truax v. Raich,* 239 U.S. 33, 41 (1915); *Smith v. Texas,* 233 U.S. 630, 636 (1914); *Allgeyer v. Louisiana,* 165 U.S. 578, 589 (1897); *Dent v. West Virginia,* 129 U.S. 114, 121-122 (1888).

C. Classifications Based Upon Age Share Many Of The Characteristics of A Suspect Classification, Which Requires A Level Of Judicial Scrutiny Above That Usually Applied To A Review Of Legislation Regulating Economic And Social Matters.

The lower court also recognized the public interest in protecting individuals from classifications based on age discrimination. Arbitrary age-based classifications exhibit the characteristics which Justice Brennan described as appropriate for determining a classification to be suspect in *Frontiero v. Richardson,* 411 U.S. 677 (1973).[20]

20. ". . .[S]ince sex, like race and national origin, is an immutable characteristic *determined solely by the accident of birth,* the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility...' *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and

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Like sex, age is simply an accident of birth and, like sex, it frequently bears no relation to the ability to perform or contribute to society. Like distinctions based upon sex, distinctions based upon age are grounded in misconceptions which have come to pervade the statute books and have the effect of relegating the class, the aged, to an inferior legal status regardless of individual ability. *See Frontiero v. Richardson, supra* at 684-687. This similarity suggests the propriety of according age-based classifications the same scrutiny accorded gender-based classifications. *See Stanton v. Stanton,* 95 S. Ct. 1373 (1975).

The effects upon a person who is subject to a classification based upon age, which takes from him his employment at age 50 when he is otherwise fully qualified to continue, have been documented and are beyond dispute. A long series of diverse studies has been undertaken, and all the studies have reached surprisingly similar conclusions.[21]

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aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status *without regard to the actual capabilities* of its individual members." *Id.* at 686-687 (emphasis added).

21. *See generally* 1971 White House Conference on Aging, Section Recommendations on Employment and Retirement, U.S. Dept. of Labor, Research Materials Accompanying Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965); Institute of Labor and Industrial Relations, *Too Old to Work — Too Young to Retire: A Case Study of a Permanent Plant Shutdown,* prepared for the Senate Special Committee on Unemployment Problems, 86th Cong. 1st Sess. (1959). The Governors Special Planning Commission on Elderly Affairs, *A Profile of*

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Inevitably, the conclusions arrived at show that the employee who is age 40 or older and is displaced from his job is faced with severe economic and psychological stresses. He is not a desirable employee for new employment since most employers prefer to hire younger persons.[22] He may remain unemployed for months or years. Pensions, benefits and other substitute sources of income are not adequate to maintain his living standard.[23]

Often more than mere personal or family finances are involved. The employee's very physical and psychological well being may be adversely affected. The over-forty unemployed person is likely to become apathetic and demoralized or develop a self-deprecating attitude.[24]

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Massachusetts Elderly (1971); A Report of the Special Committee on Aging, United States Senate, *Developments in Aging: 1971 and January-March 1972,* S. Rep. No. 92-784 92nd Cong. 2d Sess. (XXII) (1972) (hereinafter "Developments in Aging"); Note, *Age Discrimination in Employment: The Problem of the Older Worker,* 41 N.Y.U. L. Rev. 383 (1966).

22. *See* Developments in Aging at 48; Research Materials at 89-90.

23. *See* Hearings Before the Subcommittee on Employment and Retirement of the Special Committee on Aging, United States Senate, 92nd Cong. 1st Sess. pt. 4 (1971) (hereinafter "Employment and Retirement"); *Economics of Aging: Towards a Full Share in Abundance — Facts and Findings,* The Task Force Report Brief, 115 Cong. Dec. 230 (1969).

24. *See* Employment and Retirement, *supra* at 241; Profile *supra* at 8. *See generally,* Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans,* 44 So. Cal. L. Rev. 150 (1972).

D. The Legislative Response To The Problem Of Age-based Discrimination In Employment Indicates A Clear Statement Of Public Policy Against Mandatory Retirement At Age 50 Which Should Be Given Judicial Deference.

Congress has recognized these facts and the adverse effect they have on commerce and has made their continuation violative of the law.[25] In the statement of findings and purpose of the age discrimination in Employment Act of 1967, Congress succinctly summarized the problems of the displaced older worker when it found:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long term unemployment with resultant deterioration of skill, morale and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.

The act was amended by Pub. L. 93-259, effective May 1, 1974, to expand the definition of employer to include "a State of

25. Age Discrimination in Employment Act of 1967, 81 Stat. 602; 29 U.S.C. §§621-634 (1967).

political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State . . . ." The effect of this amendment is to extend the coverage of the act to cases like the present one.

The Older Americans Act of 1965 declares it to be the joint and several duty of the governments of the United States and of the several states and their political subdivisions to assist older people to secure equal opportunity for employment with no discriminatory personnel practices because of age.[26]

Government contractors are subject to Executive Order No. 11141, which prohibits discrimination based upon age.[27] Governmental agencies are under specific instructions from the President to eliminate age discrimination in the Federal Government.[28] Approximately 30 states have specific legislation forbidding discrimination based upon age, including Massachusetts.[29]

26. 79 Stat. 219, 42 U.S.C. §3001 (1965).

27. Executive Order No. 11141 was signed February 12, 1964 and appears in the Code of Federal Regulations at 3 C.F.R. 179.

28. *See* Memorandum for Heads of Departments and Agencies dated September 13, 1972. (R. Plaintiff's Trial Brief Appendix B).

29.

Alaska:	Alaska Statutes, Title 18, §§18.80.010 to 18.80.300.
California:	Deering's California Code Annotated, Article 14, §§1410-1433.
Connecticut:	Connecticut General Statutes Annotated, ch. 563, §§31-122 to 31-128.
Delaware:	Delaware Code Annotated, Title 19, ch. 7, Subchapter II, §§710-718.

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The Massachusetts policy against discrimination based upon age is extremely clear and well defined. The Massachusetts statutory scheme as set forth in Mass. Gen. Laws ch. 149

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District of Columbia:	District of Columbia Commission on Human Rights, Commissioner's Order No. 72-224 (July 8, 1971).
Georgia:	Georgia Code Annotated, *as amended by* H.B. 1971, approved April 5, 1971, effective July 1, 1971.
Hawaii:	Hawaii Revised Statutes, Title 21, ch. 378, §§378-1 to 378-10.
Iowa:	Iowa General Act 61, ch. 121, §1.
Kentucky:	Kentucky Revised Statutes, ch. 344, §§344.010 to 344.515.
Louisiana:	L.S.A. Revised Statutes, Chapter 9, Title 23, §§892, 893.
Maine:	Maine Revised Statutes Annotated, Title 5, Part 12, ch. 317, subchapters I-VI.
Maryland:	Annotated Code of Maryland, Article 49B, §§1-30.
Massachusetts:	Massachusetts General Laws ch. 149, ch. 151B; *see also* Governor's Code of Fair Practices, Executive Order No. 79 (July 20, 1970).
Michigan:	Michigan Compiled Laws Annotated, §§423.301 to 423.311.
Montana:	Montana Revised Code, Title 64, §§64-304 to 64-312.
Nebraska:	Revised Statutes of Nebraska, §§48-1001 to 48-1009.
Nevada:	Nevada Revised Statutes, ch. 613, §§310-430.
New Hampshire:	New Hampshire Revised Statutes Annotated, Title 31, ch. 354-A, §§354A-1 to 354A-14.
New Jersey:	New Jersey Statutes Annotated, Title 10, ch. 5, §§10:5-1 to 10:5-28.
New Mexico:	New Mexico Statutes Annotated, Chapter 4, Art. 33, §§4-33-1 to 4-33-13.
New York:	McKinney's Consolidated Laws of New York Annotated, Chapter 15, §§290-301.
North Dakota:	H.B. 918, L. 1965, §1-2, effective July 1, 1965.
Oregon:	Oregon Revised Statutes, §§659.010 to 659.115, 659.990.
Pennsylvania:	Purdon's Pennsylvania Statutes Annotated, Title 43, ch. 17, §§951-963.
Puerto Rico:	Law of Puerto Rico Annotated, Title 29, Part 1., ch. 7, §§146-152.
South Carolina:	H.B. 3370 Laws 1972, effective June 23, 1972.
Texas:	Vernon's Annotated Revised Civil Statutes of Texas, Article 6252-14.

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declares it to be against public policy to dismiss from employment any person between the ages of 45 and 65.[30] The statute has been held to be like a criminal statute. *Johnson v. U.S. Steel Corp.*, 348 Mass. 168 (1964).

Mass. Gen. Laws ch. 32, §26(3)(a) would seem unlawful on its face under the provisions of Mass. Gen. Laws ch. 151B, the broad-sweeping anti-discrimination statute of Massachusetts (hereinafter the "statute").

Retirement of members of the Uniformed Branch is the action of an "employer" under the statute. Section 1(5) declares that "[t]he term 'employer' . . . shall include the Commonwealth and all political subdivisions, boards, departments and commissions thereof."

The appellee, age 50 at the time of his retirement, is a covered "employee" under the statute.[31]

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Washington:	Revised Code of Washington, Title 49, ch. 49.60, §§49.60.010-49.60.320.
West Virginia:	West Virginia Code, Chapter 5, Art. 11, §§5-11-1 to 5-11-19.
Wisconsin:	Wisconsin Statutes Annotated, Title 13, ch. 111, subchapter II, §§111.31 to 111.37.

30. Mass. G. L. ch. 149, §24A.

31. Section 1(6) of the statute defines employee by listing those not included. "The term 'employee' does not include any individual employed by his parents, spouse or child, or in the domestic service of any person."

The statute extends its protection to those covered employees between the ages of 40 and 65, unless a different meaning clearly appears from the context. Section 1(8).

Action by the Commonwealth as an "employer" under the statute in mandatorily retiring all those uniformed officers age 50 pursuant to the challenged statute is clearly an unlawful practice under Section 4(1) of the statute. That section makes it unlawful for an employer by his own actions or those of his agent "because of the . . . age . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless based upon a bona fide occupational qualification."

Appellee submits that the Commonwealth cannot show that mandatory retirement at age 50 is a bona fide occupational qualification because, as the district court concluded, the appellee has established the absence of any factual basis for mandatory retirement at age 50. 376 F. Supp. at 756.

Finally, in Executive Order No. 74 of July 20, 1970, entitled the Governor's Code of Fair Practices, it is declared to be the policy for all state agencies to refrain from all discrimination in employment including discrimination based upon age.

The thrust of the legislative policy as expressed in Congress and in the state legislatures is to strike down classifications based upon generalized misconceptions as to age, and to institute in their stead procedures to measure the individual's qualifications, abilities and needs, regardless of age.

Both Congress and the Massachusetts General Court enacted these remedial statutes on the strength of determinations that job performance is not related to the attainment of an

arbitrary age.[32] When reviewing the mandatory retirement statute applicable to members of the Uniformed Branch of the State Police, the Court must give weight to these legislative determinations. *Cf. Frontiero v. Richardson, supra* at 687-688; *Oregon v. Mitchell, supra* at 248-249 (opinion of Brennan, White and Marshall, J.J.); *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966).

CONCLUSION

For the reasons stated above the decision of the district court should be affirmed.

Respectfully submitted,

s/ Robert D. City

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32. 29 U.S.C. §621(a)(2); Mass. H. Doc. No. 3677 (1966).